

WILLIAM PERLMAN

IBLA 85-752, IBLA 85-753,
IBLA 85-754, IBLA 85-761

Decided March 18, 1987

Appeals from four decisions of the Colorado State Office, Bureau of Land Management, two of which affirmed notices of incidents of noncompliance and subsequent assessments of liquidated damages for failure to comply with a written order (TPR-CO-85-34, TPR-CO-85-35), and two of which affirmed notices of incidents of noncompliance ordering corrective action (TPR-CO-85-36, TPR-CO-85-37).

Affirmed in part; affirmed as modified in part.

1. Oil and Gas Leases: Generally -- Oil and Gas Leases: Civil Assessments and Penalties -- Regulations: Generally

BLM may properly issue a notice of incidents of noncompliance requiring an oil and gas lessee to have all meters functioning properly, and assess liquidated damages under 43 CFR 3163.3(a) for failure to timely comply with that notice by calibrating the meters. The \$ 250 assessment for noncompliance is a one-time charge per violation under 43 CFR 3163.3.

2. Oil and Gas Leases: Generally -- Oil and Gas Leases: Civil Assessments and Penalties -- Oil and Gas Leases: Incidents of Noncompliance -- Regulations: Generally

BLM may properly issue a notice of incidents of noncompliance requiring an oil and gas lessee to shorten meter hoses in order to prevent the collection of fluid in low spots, and assess liquidated damages under 43 CFR 3163.3(a) for failure to comply with that notice. The \$ 250 assessment for noncompliance is a one-time charge per violation under 43 CFR 3163.3.

3. Oil and Gas Leases: Generally -- Oil and Gas Leases: Incidents of Noncompliance -- Regulations: Generally

BLM may properly require an oil and gas lessee to construct a berm around a tank in which produced water is stored, because BLM is authorized by Departmental regulations to issue instructions or orders relating to the protection of environmental quality. However, such a requirement may not be based upon a condition in the

lessee's application for permit to drill requiring the construction of firewalls around tank batteries since a firewall is a wall to retain oil in case of its escape from a tank or to prevent the spread of burning oil.

APPEARANCES: Julia Hook, Esq., Susan N. H. Dixon, Esq., Denver, Colorado, for appellant; Lowell L. Madsen, Esq., Office of the Regional Solicitor, Rocky Mountain Region, U.S. Department of the Interior, Denver, Colorado, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE HARRIS

William Perlman has appealed four decisions of the Colorado State Office, Bureau of Land Management (BLM), rendered in response to appellant's requests for technical and procedural review (TPR), affirming a series of notices of incidents of noncompliance (INC) issued by the San Juan Resource Area Manager, BLM, with respect to operations conducted by appellant on Indian oil and gas leases MOO-C-1420-1518, MOO-C-1420-1521, MOO-C-1420-1522, and MOO-C-1420-1531, La Plata County, Colorado. Two of the four decisions under appeal (IBLA 85-761 (TPR-CO-85-34) and IBLA 85-753 (TPR-CO-85-35)) affirmed a total of six INC's for failure to comply with written orders issued by BLM, and related assessments of \$ 250 per violation under 43 CFR 3163.3(a). The other two decisions (IBLA 85-752 (TPR-CO-85-36) and IBLA 85-754 (TPR-CO-85-37)) affirmed BLM's issuance of INC's ordering appellant to construct a firewall/berm around three water storage tanks; these INC's did not involve any assessment of damages under 43 CFR Subpart 3163. On August 15, 1985, the Board granted appellant's motion to consolidate these four appeals. 1/

IBLA 85-761 (TPR-CO-85-34)

On April 15, 1985, the San Juan Resource Area Office, BLM, issued two INC's to appellant regarding the Southern Ute wells No. 35-1 and 20-1B, located on Indian leases MOO-C-1420-1531 and MOO-C-1420-1521, respectively, in La Plata County, Colorado. Each INC cited appellant for his alleged failure to comply with a March 12, 1985, order of BLM. That order provided: "Within 15 days of the receipt of this letter all meters will be functioning properly, i.e. producing wells will be recording in the middle 1/3 of chart; shut-in wells will be recording zero differential pressure at the zero mark on the chart."

The INC issued concerning the No. 35-1 well cited appellant for failure to calibrate the meter as required by the March 12, 1985, order. The meter recorder showed a differential line reading below zero while the well was shut-in.

The INC regarding the No. 20-1B well cited appellant for noncompliance with the March 12, 1985, order because the meter records showed a differential

1/ On Sept. 12, 1986, the Board issued an order consolidating another appeal (IBLA 85-784) with these four. However, further review has indicated that IBLA 85-784 should be dealt with separately.

reading above zero for the shut-in well. The INC stated: "A high or low reading is an indication that the meter is not in calibration." BLM imposed an assessment of \$ 250 for each INC.

Appellant filed a request for TPR of both INC's with the Colorado State Office, BLM, arguing that BLM's March 12, 1985, order contained "two major flaws" which rendered the subsequent INC's for noncompliance improperly issued; consequently, he asserted, BLM improperly levied the assessments for noncompliance with the defective order.

The first flaw discussed by appellant concerned 43 CFR 3162.1(a), the authority relied upon by BLM in issuing its March 12, 1985, order. According to appellant, 43 CFR 3162.1(a) 2/ did not authorize BLM to take the action specified in its March 12 order: "While a lessee's compliance with a properly issued order is required by the quoted regulation, it does not authorize the BLM to issue an order on any grounds. As a result, the March 12, 1985, order was invalid" (Request for TPR at 3). Second, appellant asserts that the March 12 order requires him to achieve and maintain a "particular state of affairs," not to perform a specific procedure and, thus, was overly broad (Request for TPR at 3).

The Colorado State Office, BLM, affirmed the INC's and the related assessments for noncompliance (Decision (TPR-CO-85-34)). In its decision, BLM explained that "[t]he authority for the authorized officer to issue written orders or oral orders to govern specific lease operations is given in 43 CFR Part 3161.2." 3/ BLM further stated that a "written order provides an opportunity for an operator to bring his operations into compliance without assessments or penalties," and that failure to comply with the order subjects the operator to immediate assessments and/or further enforcement action.

Additionally, BLM rejected appellant's argument that the March 12 order required him to maintain a state of affairs rather than to perform a specific act:

"Functioning properly" if not further defined can be overly broad, however, the order did define what was expected of the operator. The order included as attachments, 1) the wells and leases affected and 2) the conditions of approval for the production facilities. The conditions of approval specifically require conformance to specifications and recommendations in American Gas Association Publication, Gas Measurement Committee Report No. 3. Further, the order included language as to the meaning of "functioning properly", i.e., producing wells will record in the middle third of the chart; shut-in wells will record zero differential pressure at the zero mark on the chart.

The order was also clear as to the timeframe the operator was given to comply. The order set a standard that was expected

2/ The text of 43 CFR 3162.1(a) is quoted infra in this decision.

3/ Regulation 43 CFR 3161.2 provides in pertinent part as follows: "The authorized officer may issue written or oral orders to govern specific lease operations."

to be met and established a state of affairs to be maintained. The operator had 15 days after receipt of the order to achieve compliance. If the operator achieved compliance before or on the critical date of March 30, 1985, no assessment would have been issued if the meter failed through no fault of the operator. The fact that the operator gave no report as required had a great bearing on this issue. Lacking any information to the contrary the BLM inspector has no reason to assume compliance was achieved and the issuance of an INC would be proper.

It is not the current policy of the BLM to order the existence of a specific state of affairs and then impose an assessment on an operator if that state of affairs is not always maintained. Once compliance is achieved and an inspector finds the meter not functioning properly at a later date, the problem will be called to the attention of the operator by an INC or written order with a new timeframe to comply.

(TPR Decision at 2).

In his statement of reasons, appellant reiterates the argument that the March 12, 1985, order was over-broad, in that it required appellant "to achieve and maintain a particular state of affairs" (Statement of Reasons (SOR) at 5). In addition, appellant advances the argument that he had voluntarily shut in the No. 35-1 well due to the production of "large volumes of slightly saline water" during January through April of 1985. The pertinence of this fact is explained as follows:

When a well is shut-in, a gas meter cannot be calibrated because gas must be flowing before a meter's accuracy can be tested and the meter adjusted. Because of the produced water disposal problems associated with the Southern Ute No. 35-1 Well, calibration of the meter on the well was not possible during January, February, March and April of 1985 without creating environmental problems.

(SOR at 5).

[1] We reject appellant's argument that the San Juan Resource Area Office did not have authority to issue the two INC's involved in IBLA 85-761. Regulation 43 CFR 3162.1(a) confers broad authority upon BLM's authorized officer to issue "orders and instructions" of the kind challenged herein:

The lessee shall comply with applicable laws and regulations; with the lease terms, Onshore Oil and Gas Orders, NTL's; and with other orders and instructions of the authorized officer. These include, but are not limited to, conducting all operations in a manner which ensures the proper handling, measurement, disposition, and site security of leasehold production; which protects other natural resources and environmental quality; which protects life and property; and which results in maximum ultimate economic recovery of oil and gas with minimum waste and with minimum adverse effect on ultimate recovery of other mineral resources.

Moreover, 43 CFR 3162.5-1(a) reiterates this grant of authority:

The lessee shall conduct operations in a manner which protects the mineral resources, other natural resources, and environmental quality. In that respect, the lessee shall comply with the pertinent orders of the authorized officer and other standards and procedures as set forth in the applicable laws, regulations, lease terms and conditions, and the approved drilling plan or subsequent operations plan. [Emphasis added.]

In short, we find no merit in appellant's contention that these INC's were issued without regulatory authority. See Willard Pease Oil & Gas Co., 89 IBLA 236, 238-39 (1985) (failure of lessee to comply with BLM order to remove and dispose of contaminated soil).

We turn now to appellant's argument that these two INC's were overbroad in requiring him to achieve and maintain a "particular state of affairs," rather than to perform a specific action. Initially, we note that 43 CFR 3162.7-3 requires that "[a]ll gas production shall be measured by orifice meters or other methods acceptable to the authorized officer on the lease pursuant to methods and procedures prescribed in applicable orders and notices." According to a memorandum dated August 22, 1985, from the Deputy State Director, Mineral Resources, Colorado State Office, to the Regional Solicitor, Rocky Mountain Region, which was filed with this Board in answer to appellant's statement of reasons (hereinafter "Answer"), the conditions of approval attached to appellant's application for permit to drill (APD) required appellant to "meet minimum standards for his production facilities." Significantly, "[t]hose standards included the testing of his sale meters" on a monthly basis for the first 3 months on new meter installations and, if proven adequate, at least quarterly thereafter (Answer at 1). These conditions of approval were set forth in attachment No. 1 of the March 12, 1985, letter to appellant. "The order clearly pointed out the need for regular calibrations to be performed and stated the timeframes to correct deficiencies and for submitting supporting documentation, such as calibration reports" (Answer at 2).

We find that the March 12, 1985, order that appellant have all meters for the wells "functioning properly" is not fatally vague or general, as appellant argues. The order indicated that "shut-in wells will record zero differential pressure at the zero mark on the chart." According to the decision of the Colorado State Office, the conditions of approval of an APD "specifically require conformance to specifications and recommendations in American Gas Association Publication, Gas Measurement Committee Report No. 3" (TPR Decision at 2). The importance of calibration tests to determine whether well meters are functioning properly is discussed in BLM's answer:

It should be pointed out that obtaining a meter reading within the middle third of the chart or at zero at zero flow conditions alone does not mean the meter reading is accurate. Accuracy of the meter is only inferred from a calibration test and the fact the meter is being operated in conformance with the standards given in American Gas Association Report No. 3 (i.e. the meter is recording zero at zero flow conditions, etc.). It

can be stated that, if the meter is not recording at zero for no flow conditions, the meter is not calibrated properly and/ or functioning properly. [Emphasis in original.]

(Answer at 2).

Appellant's argument that because the wells were shut-in and therefore could not be calibrated is refuted in BLM's answer. "To calibrate a meter, the meter is isolated from the well and a calibration device, such as a dead-weight tester, is connected to the meter. The static pressure elements can then be checked and calibrated" (Answer at 2). We find BLM properly upheld the issuance of the INC's.

As to the assessments for noncompliance of \$ 250 for each of the two INC's involved in IBLA 85-761, appellant argues that 43 CFR 3163.3(a) "was promulgated to allow the BLM to punish an operator who fails to take the specific actions described in a proper order without having to give the operator additional notice" (SOR at 6). The effect is that BLM imposes "assessments on Perlman without giving him notice of specific defects and an opportunity to cure them" (SOR at 7).

Appellant misunderstands the nature and purpose of 43 CFR 3163.3(a), which authorizes BLM to impose against a lessee an assessment for "failure to comply with a written order or instructions of the authorized officer, \$ 250.00 if compliance is not obtained within the time specified." The written order or instruction constitutes the notice to the operator. Herein, Perlman received the order which included a time for abatement of the condition. Thus, Perlman had notice and an opportunity to cure prior to issuance of the INC's.

This Board has upheld BLM's authority to impose the assessment authorized in 43 CFR 3163.3(a), since it is in the nature of "liquidated damages" to cover loss or damage to the lessor from specific instances of noncompliance under 43 CFR 3163.3. Mont Rouge, Inc., 90 IBLA 3, 5 (1985). "Thus, if a finding of noncompliance is technically and procedurally correct, a minimum assessment is properly levied, regardless of subsequent efforts on the part of lessee to comply by abatement of the noncompliance condition." Id.

Since the issuance of the two INC's involved in IBLA 85-761 was technically and procedurally correct, it follows that the assessment of \$ 250 for each violation was proper. Under the current version of 43 CFR 3163.3, BLM may assess a one-time liquidated damages charge of \$ 250 for each incident of noncompliance arising from failure to comply with a written order of an authorized officer. 4/ Willard Pease Oil & Gas Co., 89 IBLA at 240; see 49 FR

4/ The previous version of 43 CFR 3163.3 (1983) provided that the assessments would be applicable to each successive day of the noncompliance. However, that regulation was amended effective Oct. 22, 1984, deleting the provision for continuing assessment of liquidated damages for each day of noncompliance. See 49 FR 37361, 37365 (Sept. 21, 1984). The revised regulations under 43 CFR 3160 published Sept. 21, 1984, were suspended, in part, by notice published in the Federal Register on Mar. 22, 1985. 50 FR

37361 (Sept. 21, 1984). We affirm BLM's assessment of a total of \$ 500 for appellant's failure to comply with the two INC's involved herein.

IBLA 85-753 (TPR-CO-85-35)

On April 15, 1985, the San Juan Resource Area Office, BLM, issued four INC's to appellant concerning operations at the Southern Ute wells No. 1-1, 17-1, 17-2, and 35-1 located on Indian leases MOO-C-1420-1522, MOO-C-1420-1518, MOO-C-1420-1521, and MOO-C-1420-1531, respectively. Each of the INC's cited appellant for his alleged failure to comply with a March 8, 1985, order of BLM. That order stated: "Within 30 days from receipt of this letter, please have all hoses on the meters of the following list of wells shortened so fluid will not collect in low spots." Each of the four INC's described the violations as follows: "Letter dated March 8, 1985 and received March 12, 1985 requested that meter hoses be shortened so that fluid would not collect in low spots. The hoses on this meter have not been shortened or the meter raised sufficiently to eliminate loops or low spots." In addition, each INC imposed an assessment for noncompliance in the amount of \$ 250 pursuant to 43 CFR 3163.3(a).

On May 2, 1985, appellant filed a TPR with the Colorado State Office, BLM. In the request, appellant maintained that (1) he completed the work required by the March 8, 1985, order, and again that (2) BLM's order required him to maintain a particular state of affairs at a well site in an overly broad manner.

The May 16, 1985, decision of the Colorado State Office, BLM, in response to appellant's TPR, discussed the problems associated with the collection of fluids in low spots in meter lines, and described design considerations relevant in installing such lines:

The lines should be large diameter and as short in length as convenient to minimize leaks. They should be installed with an upward slope away from the meter run of at least 8.0 centimeters per meter of line length with the differential device located above the meter run. This facilitates the drainage of any condensable fluids back into the line and minimizes the chance of formation of hydrates.

(TPR Decision at 1).

fn. 4 (continued)

11517-18. See BLM Instruction Memoranda Nos. 84-594, Change 4, and 85-384, dated Apr. 16, 1985. However, the suspension did not affect the provisions of 43 CFR 3163.3(a).

The Department's proposed rulemaking, published in the Federal Register on Jan. 30, 1986, 51 FR 3882, provided for a \$ 250 assessment for failure to comply with a notice, written order, or instruction of the authorized officer, if such failure related to a minor violation; if the failure to comply related to a major violation, failure to abate within the time allowed subjected the operator to assessments and penalties. That scheme was adopted by the Department in final rulemaking published on Feb. 20, 1987, with an effective date of Apr. 21, 1987. 52 FR 5384, 5393.

In his statement of reasons for appeal, appellant asserts that relying upon an oral instruction from a BLM employee to eliminate the loops and low spots in the meter hoses by cutting the hoses or raising the meters, he hired P&A Incorporated to raise the meter houses at all of his Southern Ute wells, including those involved in this appeal. This work was completed on March 5, 1985, according to appellant, prior to receipt of the written order. He argues that he "had the loops and low spots in the meter hoses eliminated by having the meter houses raised," and, therefore, believed no further action was necessary to comply with the written order (SOR at 8; SOR, Exh. C).

[2] The record does not support appellant's position. On April 12, 1985, when BLM's representative re-inspected the subject wells, he found that "the meters on most of the wells had been raised a few inches but the hoses on the meters for which the INC's were issued still had very noticeable loops in the hoses. The INC's were issued for failure to comply with the March 8, 1985 letter, which was not challenged" (Internal BLM Memorandum dated May 6, 1985, at 3).

The March 8, 1985, order was clear as to the result to be obtained. That appellant understood the order is demonstrated by the fact that he had some meter houses raised. However, appellant's action was not sufficient to meet BLM's desired objective: prevent collection of fluids in meter hoses by removing low spots or loops. Appellant has introduced no evidence which persuades us that the conditions stated on the face of each INC were not those encountered by BLM at the time of inspection. "The burden to overcome by a preponderance of the evidence BLM's prima facie case that conditions existed which violated Departmental regulations and lease terms is upon the party challenging an INC." Yates Petroleum Corp., 91 IBLA 252, 258 (1986).

Therefore, since we conclude that the issuance of the four INC's herein was technically and procedurally correct, we affirm BLM's assessment of \$ 250 per violation under 43 CFR 3163.3(a), for a total assessment of \$ 1,000 for this series of INC's. See Mont Rouge, Inc., 90 IBLA at 5-6; Willard Pease Oil & Gas Co., 89 IBLA at 239-41.

IBLA 85-572 (TPR-CO-85-36)

IBLA 85-574 (TPR-CO-85-37)

On April 16, 1985, the San Juan Resource Area Office, BLM, issued two INC's to appellant relating to Southern Ute well No. 29-1, located on Indian lease MOO-C-1420-1518, and to Southern Ute well No. 17-1, located on Indian lease MOO-C-1420-1521. Each INC ordered appellant to "construct a firewall/berm of sufficient capacity to contain 1-1/2 times the capacity of the storage tank." Each INC stated that the inspection had revealed the discharge of water from the storage tank flowing off the well site. The INC pertaining to the No. 29-1 well also provided that "each tank will need its own separate firewall/berm." The basis for the two INC's was appellant's alleged violation of Item 10 of the conditions of approval of the APD respecting the wells. Item 10 provides that "[i]f a tank battery is constructed on this lease, it must be surrounded by a firewall of sufficient capacity to adequately contain the storage capacity of the battery." No assessment was imposed for the violations and appellant was allowed 20 days in which to correct the violations.

On April 30, 1985, BLM issued an INC regarding the Southern Ute No. 27-1B well. The INC required appellant to "construct a firewall/berm of sufficient capacity to contain 1 1/2 times the capacity of the [water] storage tank. The firewall/berm is required to be built of water impermeable material." Again, the basis for the INC was appellant's alleged violation of Item 10 of the conditions of approval of the APD for the well. Again, no assessment for the violation was imposed. In this case BLM granted appellant 30 days to correct the violation.

Appellant's requests for TPR of these three INC's are identical. They stated:

Perlman challenges the Area Manager's authority to issue such an order without a clear statement of the BLM's authority to act. Perlman questions how a condition can be added to an Application for Permit to Drill (APD) after the APD's approval. Finally, Perlman questions whether other operators in the area are being required to build such berms or firewalls.

In its May 17, 1985, decision responding to appellant's TPR relating to the two INC's dated April 16, 1985, the Colorado State Office emphasized that Item 10 of the APD required the construction of the firewall around the water tank as a means of protecting the environment:

The authority of the BLM to issue the order is given in Onshore Oil and Gas Order No. 1, section III, subpart 5(a), which details the BLM's responsibility for completing the environmental review process and establishing the terms and conditions under which the proposed APD may be approved. The operator also certifies he will conduct his operations in conformity with the plan (APD) and the terms and conditions under which it is approved in accordance with section III, subpart 4(a).

The INC's reference to item 10, of the conditions of approval that were attached to the APD as a term and condition of approval, states: "If a tank battery is constructed on this lease, it must be surrounded by a firewall of sufficient capacity to adequately contain the storage capacity of the battery." This requirement is clear and the INC's give a specific timeframe in which the operator is expected to comply. The BLM has requested berms around water tanks of other operators in the area. Item 10 is part of the standard conditions of approval which are required of most operators. This condition was not added after approval of the APD. Rather, it was made a part of the APD at the time of approval.

(TPR Decision (TPR-CO-85-36) at 1).

The May 30, 1985, decision of the Colorado State Office, issued in response to appellant's TPR concerning the INC dated April 30, 1985, again cites Item 10 of the APD in upholding the INC, but the discussion of BLM's authority to issue the INC diverges somewhat from the discussion of that subject in the decision TPR-CO-85-36:

The authority of the authorized officer to issue such an order and the BLM's authority to act are clearly stated in 43 CFR 3160 - Onshore Oil and Gas Operations. Specifically, 43 CFR 3160.0-3 states, " . . . the Secretary [of the Interior] consolidated and transferred the onshore minerals management functions of the Department [of the Interior], except mineral revenue functions and the responsibility for leasing of restricted Indian lands, to the Bureau of Land Management." 43 CFR 3161.1 provides that, "Subject to the supervisory authority of the Secretary [of the Interior] and the Director [of the BLM], all operations conducted on or for the benefit of a Federal or Indian oil and gas lease by, or on behalf of, the lessee are subject to the regulations in this part and are under the direction of the authorized officer having jurisdiction of the leased lands." In this case, the San Juan Resource Area Manager is the authorized officer having jurisdiction over Southern Ute Lease No. MOO-C-1420-1518. Furthermore, 43 CFR 3161.2 states, "The authorized officer is authorized and directed . . . to approve, inspect and regulate the operations that are subject to the regulations in this part; to require compliance with lease terms, with regulations in this title and all other applicable regulations promulgated under the cited laws; and to require that all operations be conducted in a manner which protects other natural resources and the environmental quality . . ." Therefore, the authority of the BLM to issue such an order through an authorized officer, in this case the San Juan Resource Area Manager, is clearly stated.

The INC's reference to Item 10 of the conditions of approval to the APD that were attached to the APD as a term and condition of approval states, "If a tank battery is constructed on this lease, it must be surrounded by a firewall of sufficient capacity to adequately contain the storage capacity of the battery." This requirement is clear and the INC gives a specific timeframe in which the operator is expected to comply. Item 10 was not added after approval of the APD. Rather, it was made a part of the APD at the time of approval.

The BLM has requested berms or firewalls around other operator's tank batteries in this area. Item 10 is part of the standard conditions of approval which are being attached to all APDs in the Montrose District.

The phrase "water impermeable" was used to ensure that the berm/firewall would not be built of a highly permeable material, such as gravel, which would not contain spilled fluids. Constructing the berm/firewall of a water permeable material would defeat its purpose.

(TPR Decision (TPR-CO-85-37) at 1-2).

In his statement of reasons for appeal of these two decisions appellant again questions BLM's authority to issue this series of INC's. However, for the first time he raises the question concerning the definition of "tank

battery." He quotes the definition of "tank battery" from Williams and Myers, Manual of Oil and Gas Terms (1984): "A group of tanks located at convenient points for storing oil prior to transportation by truck or pipeline to a refinery." (Emphasis added.) According to appellant, the definition of "tank battery" does not encompass a water storage tank, but relates only to tanks used for the storage of oil.

[3] BLM, in its answer to appellant's statement of reasons, asserts that the definitions of the terms "tank" and "battery" in the Bureau of Mines' A Dictionary of Mining, Mineral, and Related Terms (1968), reflects the common usage of those terms. The term "tank" is defined as "[a] large vessel or receptable, made of either wood or metal, intended to contain a fluid as gas or water; as a water tank * * *." Id. at 119. The term "battery" is defined as "[a] number of similar machines or similar pieces of equipment placed side by side on single or separate base and operated by means of common connections as a unit." Id. at 88. The purpose for requiring the berm/firewall, according to BLM, is to protect the environment, particularly from substances noxious to animal and plant life, whether the substance is water or oil. The production of saline water is of particular concern to BLM:

The produced water, by Perlman's own statement, is slightly saline. Saline water is toxic or noxious to animals and plant life. Produced water commonly contains trace materials, such as toluene and benzene, that are toxic or carcinogenic in nature. The Bureau is charged under 43 CFR 3161.2 to require operations to be conducted in a manner which protects the environmental quality. It is for this reason a special program, Notice to Lessees 2B (NTL-2B), was promulgated to properly dispose of produced water. Generally the properties of the produced water are such that the use of a common or standard stipulation, such as requiring a berm around tanks, prevents potential environmental damage from accidental spills. If any operator had a special case which would justify not constructing the berms, a waiver of the requirement could be granted by the Authorized Officer (AO). No such waiver was requested or granted.

(Answer at 4).

Moreover, BLM presents photographic evidence (Answer, Exh. 1), unrefuted by appellant, that other operators in the same general area as appellant's well sites have constructed and maintained berms around tank batteries, including water storage tanks.

Although BLM relies on the definitions of "tank" and "battery" in A Dictionary of Mining, Mineral and Related Terms (1968) to support its position, that same source defines "firewall" as "[a] wall to retain oil in case of its escape from a tank or to prevent the spread of burning oil." Id. at 431. (Emphasis added.) Item 10 of the APD conditions does not refer to berms. It is limited to the construction of firewalls. Since firewalls are built to contain oil, we must agree with appellant that Item 10 of the APD does not require the construction of firewalls around water storage tanks. Thus, to the extent BLM relied on Item 10 as a basis for requiring the construction of the berm/firewall, it was incorrect.

We cannot agree with appellant, however, that there is no authority for requiring the construction of berms around water storage tanks. Regulation 43 CFR 3162.1(a) provides that "[t]he lessee shall comply with applicable laws and regulations; with the lease terms, Onshore Oil and Gas Orders, NTL's; and with other orders and instructions of the authorized officer." These Onshore Oil and Gas Orders, NTL's, and other instructions and orders may relate to, inter alia, the protection of "natural resources and environmental quality." Moreover, 43 CFR 3162.5-1(c) requires: "All spills or leakages of oil, gas, produced water, toxic liquids, or waste materials, blowouts, fires, personal injuries, and fatalities shall be reported by the lessee in accordance with these regulations and as prescribed in applicable orders or notices." (Emphasis added.) Subsections (a) and (b) of 43 CFR 3162.5-1 confer broad authority upon BLM in establishing methods for preventing environmental damage due to spills or leakages of oil, gas, and produced water. "In that respect the lessee shall comply with the pertinent orders of the authorized officer and other standards and procedures as set forth in the applicable laws, regulations, lease terms, and conditions, and the approved drilling plan or subsequent operations plan." 43 CFR 3162.5-1(a). Also, 43 CFR 3162.5-1(b) requires that "[a]ll produced water must be disposed of by injection into the subsurface, by approved pits, or by other methods which have been approved by the authorized officer." Moreover, as pointed out by BLM in its Answer, NTL-2B was promulgated to require proper disposition of produced water.

The regulations confer broad authority on BLM to require that oil and gas operations are undertaken in a manner to ensure the protection of the environment. An order requiring that a berm be constructed to retain produced water is clearly within BLM's authority under Departmental regulations. Herein, in each case appellant was granted a certain period of time in which to correct the violation and no assessments were levied.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decisions of the Colorado State Office on TPR-CO-85-34 (IBLA 85-761) and TPR-CO-85-35 (IBLA 85-753) are affirmed, and the decisions of the Colorado State Office on TPR-85-36 (IBLA 85-572) and TPR-85-37 (IBLA 85-574) are affirmed as modified.

Bruce R. Harris
Administrative Judge

We concur:

Gail M. Frazier
Administrative Judge

John H. Kelly
Administrative Judge.

